Snohomish County
Prosecuting Attorney
Mark K. Roe

Criminal Division
Joan T. Cavagnaro, Chief Deputy
Mission Building, MS 504.
3000 Rockefeller Ave.
Everett, WA 98201-4060
(425) 388-3333
Fax (425) 388-3572

MEMORANDUM

TO: All Law Enforcement Agencies of Snohomish County

FROM: Mark Roe
Snohomish County Prosecuting Attorney

DATE: June 3, 2013

RE: Changes to charging standards for crimes involving marijuana and miscellaneous misdemeanor crimes

I. CRIMES INVOLVING MARIJUANA

The public, the legislature, and the bench in our state have acted to restrict the scope of activities involving the use of marijuana that are subject to criminal prosecution. We believe that the public still expects us to prosecute, and we will endeavor to prosecute, the following crimes involving marijuana: marijuana use by juveniles, marijuana crimes that endanger juveniles, driving offenses involving use of marijuana, and illegal sales of marijuana to undercover officers or to confidential informants who are available to testify. In addition, we will pursue prosecution on certain felony marijuana cases that represent a real and present danger to the community if not prosecuted. The latter cases will be judiciously chosen after consultation with the referring law enforcement agency.

While possession of marijuana remains illegal under federal law, as of December 6, 2012, it no longer is illegal under state law for persons aged 21 or older to possess 1 ounce (28.3 grams) or less of marijuana, 16 ounces or less of marijuana-infused product in solid form, or 72 ounces or less of marijuana-infused product in liquid form. As of December 6, 2012, it also is no longer illegal under state law for persons to possess devices used to smoke marijuana. For marijuana possessory crimes committed on or after December 6, 2012, the definition of marijuana has changed, such that to prove a possessory crime we must obtain crime laboratory analysis of the substance to show that the substance has a THC concentration greater than 0.3 percent on a dry weight basis, and we must have that analyst available to testify about the result.

A. Possession of Marijuana < 40 grams, misdemeanor

1. Adults

In general, we will no longer prosecute misdemeanor Possession of Marijuana when the offender is 18 years old or older. The cost of prosecuting these crimes has soared due to the new definition of marijuana. Pursuing these crimes now

requires the added investigatory step of obtaining crime lab analysis whereas previously a leaf examination was sufficient, and this greatly increases the cost to the police agency, the state crime lab, and the prosecutor's office which must pay the lab analyst's expenses for travelling to and from court. Our state crime labs already are overburdened with work. Adding THC analysis for adult misdemeanor possessory crimes to the crime lab's workload is not feasible.

We ask that law enforcement agencies refrain from sending us adult misdemeanor Possession of Marijuana referrals when that is the only crime committed.

As an alternative, police agencies may wish to consider citing persons who smoke marijuana in a public place or in any place of employment (other than passing by or through a public place while on a public sidewalk or public right-of-way), with an infraction (RCW 70.160.030, 70.160.070, and 70.160.075). These infractions do not distinguish between marijuana and tobacco smoking, so there is no requirement of proving the substance was marijuana or of proving the THC concentration. The suggested bail amount for these infractions is $205.

As of December 6, 2012, there is another infraction for openly consuming or possessing marijuana in public. The maximum penalty for this is $50, plus a $53 assessment, or $103 total. Presently, there is no official RCW citation for this new infraction, so it should be cited as a violation of Washington Session Law 13C3S21. This new infraction is more difficult to prove than the more general smoking-in-public-place infraction. At a minimum, the officer's affidavit supporting the citation should include the officer's training and experience identifying marijuana, the officer's observations that support the officer's opinion that the substance is marijuana, the circumstances and manner in which the offender interacted with the substance, and any admissions by the offender that the substance is marijuana. There is an argument to be made that nothing more is required, if the above establishes by a preponderance of the evidence that the substance was "useable marijuana", i.e., dried marijuana flowers or "bud". If the judge rules that there must be some evidence regarding the THC concentration of the substance, then an affidavit from the Washington State Toxicologist, Dr. Fiona Cooper, stating that the average THC in marijuana is much higher than 0.3 percent on a dry weight basis (the new definition of "marijuana"), may suffice, given that the burden of proof for an infraction is by a preponderance of the evidence. Obviously, if the judges hearing these infractions interpret the new law to require a crime lab test of THC concentration to prove that the infraction was committed, the cost of citing this infraction will be prohibitive. Please note: The Snohomish County Prosecutor's Office does not appear at contested hearings regarding non-traffic infractions, including Open/Consume Marijuana in Public.

When the infraction of Open/Consume Marijuana in Public has been committed, without probable cause for any state crime involving the marijuana in question, the marijuana should not be seized as evidence. It is not evidence of any state crime. While it is illegal under federal law, no federal agent is going to respond and make a federal case of it, unless perhaps the offender is a U.S. military member. It is recommended that the officer direct the offender to hand over the marijuana for destruction, just as an officer citing someone for Drinking Alcohol in Public would require the offender to pour out the alcohol from the bottle.

2. Juveniles

We will endeavor to prosecute misdemeanor Possession of Marijuana when the offender is younger than 18 years old and the marijuana weighed at least 1 gram. Although the cost of prosecuting these crimes has greatly increased, we believe that the scientific research indicating health risks to juveniles who use marijuana warrants pursuing these misdemeanor crimes. Whether the cost of prosecution will be more than the criminal justice system can bear is difficult to predict. For now, we want to give it a try. In Snohomish County, when a law enforcement agency refers a juvenile for a misdemeanor Possession of Marijuana, the referral first is screened for participation in the Juvenile Court Diversion Program by the court's probation department. Only if the offender is deemed ineligible for Diversion, opts out, or is rejected from the program, is the case referred to the prosecutor's office. If the referral is for possession of less than 1 gram, the prosecutor's office will decline to file a charge. We have been told that the state crime lab needs a minimum of 1 to 5 grams (preferably at least 5 grams) in order to conduct the requisite quantitative analysis. If the referral is for possession of 1 or more grams of marijuana, and the case otherwise has sufficient evidence to charge, we will send the referring law enforcement agency a request to obtain crime laboratory analysis of the substance to show that the substance has a THC concentration greater than 0.3 percent on a dry weight basis. Upon receipt of the crime lab report confirming that the substance meets this new definition of marijuana, we will charge the case. We have to have the lab report before charging, because the court scheduling of juvenile cases does not allow us sufficient time between trial confirmation and trial to obtain a lab test.

B. DUI/In Physical Control

As of December 6, 2012, it is a crime to drive if the person has, within two hours after driving, a THC concentration of 5.00 or higher as shown by analysis of the person's blood. Likewise, it is a crime to be in physical control of a motor vehicle if the person has, within two hours after being in physical control of the vehicle, a THC concentration of 5.00 or higher as shown by analysis of the person's blood.

Prosecution of DUI/In Physical Control, regardless of whether the driving impairment is due to alcohol or drugs, remains a high priority for this office. We continue to aggressively pursue these cases. When an officer has probable cause that a suspect has been driving while under the influence of marijuana or another controlled substance, a blood sample can be obtained, pursuant to a search warrant, and submitted to the Washington State Toxicology Laboratory for analysis. Other evidence of impairment – bad driving, poor FST's, officer's observations and opinion about impairment, and admissions by the offender – improve the chances of successfully prosecuting any DUI, and particularly a DUI by marijuana or another controlled substance.

C. Driving After Consumption When Under 21

As of December 6, 2012, it is a crime for a person under the age of 21 to drive or to be in physical control of a motor vehicle after consuming marijuana if the person has, within two hours after operating or being in physical control of the motor vehicle, a THC concentration above 0.00 but less than 5.00. **Prosecution of Driving After Consumption When Under 21, regardless of whether the driving impairment is due to alcohol or drugs, remains a high priority for this office.** As with minors who drive with an alcohol concentration of 0.08 or more, minors who drive with a THC concentration of 5.00 or more should be charged with DUI rather than this crime.

D. Possession, Possession with Intent, Manufacture and Delivery of Marijuana, felony crimes

1. We will continue to charge cases involving the sale/delivery of marijuana to an undercover officer, or to a confidential source if the referring agency confirms that the confidential source may be named and will be available to testify.

For other types of marijuana felony crimes, the statutory scheme which defines illegal marijuana and which provides for a medical marijuana affirmative defense creates many obstacles to successful prosecution. **For felony marijuana cases that do not involve sale/delivery, we will prosecute only if the offender represents a real and present danger to the community if not prosecuted. The latter cases will be judiciously chosen after consultation with the referring law enforcement agency.** That consultation is best done in person at an early stage in the investigation. Both the law enforcement agency and the prosecutor's office will need to agree to commit a substantial amount of resources to investigation and protracted litigation in the case. Factors that may indicate an offender represents a real and present danger to the community include but are not limited to:

a) Evidence of dealing to those under the age of 18;
b) Evidence of dealing in a school zone;
c) Evidence of being armed with a firearm;
d) The offender's criminal history score is 6 or more;
e) The offender has a previous conviction for Delivery or Possession with Intent within the last 5 years; or
f) Evidence of large scale distribution, based on unusually high number of plants, unusually high amount of cash, and/or unusually high amount of short-stay traffic to the offender's property.

In addition, the following basic requirements should be met.

2. For the felony crime of possessing marijuana, we cannot charge unless the referral includes the state crime lab report, and the report indicates that the dry weight of the marijuana is greater than 68.3 grams for an offender who is 21 years old or older, or greater than 40 grams for an offender who is under 21.

For any drug other than marijuana, we are able to charge a felony drug possession crime based on the officer's estimate of the substance's weight without packaging and a positive field test. To charge a felony Possession of Marijuana, we

must have the state crime lab report establishing that the substance is over 68.3 grams (or for an offender who is under 21 years of age, over 40 grams), and has a THC concentration greater than 0.3 percent on a dry weight basis. Marijuana loses a substantial amount of weight in the drying process, so the weight at the time of seizure likely will be far more than the weight after drying, which is what is required by the new definition of marijuana. So we cannot charge without having the crime lab report. But wait, there is more…

3. Because of the medical marijuana defense, we typically cannot successfully prosecute the felony crimes of Possession of Marijuana or Possession with Intent unless there is over 3 pounds of processed marijuana.

The medical marijuana defense is being used successfully in most felony marijuana cases, even when the offender had no proof of being a medical marijuana user or provider at the time of arrest. In addition to the legal allowance of 28.3 grams for an adult, if a person qualifies as a medical marijuana patient, the person can possess up to 15 marijuana plants and 24 ounces (1.5 pounds) of processed marijuana. And, if the person also is a designated provider to another medical marijuana patient, that person can possess another 15 marijuana plants and another 24 ounces (1.5 pounds) of processed marijuana. Moreover, these medical marijuana amounts are presumptive only, and "may be overcome with evidence of a qualifying patient's necessary medical use". WAC 246-75-010. So, it is possible for a person to claim that even more marijuana was needed for medical use. Furthermore, keep in mind that the weight of the marijuana at the time of seizure is likely to be significantly greater than when it is dried and tested by the crime lab.

4. For marijuana grow operations, we typically will not prosecute the felony crime of Manufacture of Marijuana unless there are at least 100 mature marijuana plants if tended by a single grower or at least 120 mature plants if tended by husband/wife or roommate/roommate growers .

a) The number of plants

We need a sufficient number of plants to overcome the medical marijuana allowance. Remember that 15 plants per person is the presumptive limit only, and there are plenty of "experts" who are willing to testify that this individual's medical needs required more than the presumptive amount. Please note that the U.S. Attorney's Office typically will not prosecute unless there are at least 1,000 plants.

b) Each plant should have a root ball.

Washington law (WAC 246-75-010) used to define a plant as "any marijuana plant in any stage of growth". That WAC has been repealed, and there is no other state statute or WAC defining what a marijuana plant is. Federal law requires evidence of root formation in order to be deemed a plant. *U.S. v. Robinson,* 35 F.3d 442 (9th Cir. 1994). Seedlings no longer count as plants.

c) Documentation of number of plants, root balls on plants

Photograph the grow operation as a whole, and any distinct sections of the grow. Document the number of plants in the grow, and the number of plants in any distinct sections of the grow. For each plant with a root ball, up to the first 100 plants (120 if two

growers), photograph the plant in the pot, and again photograph the same plant with the root ball exposed. Use numbered placards and size scales in the photographs to identify the plant. If there are more plants with root balls than you are photographing, document this in your report.

d) Preservation of parts of the marijuana plants for trial

For each plant with a root ball, up to the first 100 plants (120 if two growers), harvest a sample of the bud from the plant, so later it can be dried, weighed and tested, if necessary. Each sample should be in a separate bag and marked with a number that corresponds with the number assigned to the plant it came from. Use packaging material that allows the plant material to dry without molding, and which minimizes leakage.

e) Medical marijuana authorization

Always ask if the growers have medical authorization to have marijuana and if they are designated providers of medical marijuana. Photograph and otherwise document any medical marijuana authorization.

f) Collective gardens

By law, each collective garden can have up to 45 plants. If a collective garden has more than 45 plants, document and photograph whether the plants have been cordoned off into separate and distinct areas, and whether these separate and distinct areas have posted authorizations.

g) Search warrants to seize grow operations

A recent issue with conflicting rulings at the trial court level is whether probable cause for a search warrant for a marijuana grow operation is sufficient when the affidavit contains nothing to show that the marijuana is not medical marijuana. Since there is no state registry for qualified patients or providers at this time, some trial court judges are requiring that the search warrant affidavit must have other evidence to disprove legal possession for medical marijuana purposes, such as admissions of non-medical marijuana sales by the offender, or sale/delivery to an undercover officer or confidential source who is not a qualified patient. Without such evidence in the affidavit, some judges are suppressing all that was seized pursuant to the warrant. It is recommended that the search warrant affidavit contain a) a statement acknowledging that the suspect is not registered in any state registry for qualified patients or providers, because no such state registry exists; and b) any facts that disprove legal possession for medical marijuana purposes.

II. MISCELLANEOUS MISDEMEANOR CRIMES

There are a few minor misdemeanor crimes that regretfully, we no longer have the resources to prosecute. In the past, we had the option of allowing a bail forfeiture for minor misdemeanor crimes. That option has been eliminated, so we must be prepared to go to jury trial on all misdemeanor crimes we file, if the defendant declines to plead guilty. That means a judge, a prosecutor, a law enforcement officer, and often a public-appointed defender are in court for a day, when they could be working on higher priority matters. There are always exceptional cases that need to be dealt with

as a criminal charge. But often, these more minor crimes can be adequately dealt with as civil infractions.

A. Unlawful Transit Conduct, RCW 9.91.025

In general, we will no longer prosecute the crime of Unlawful Transit Conduct, when the offender committed no other crimes. Examples of Unlawful Transit Conduct referrals that should be sent to us include referrals involving assault, reckless endangerment, malicious mischief, or disorderly conduct (obstructing traffic). We ask that law enforcement agencies refrain from sending us Unlawful Transit Conduct referrals when there are no other chargeable crimes. In those situations, there may be an applicable infraction to cite instead. Some possible infractions that may apply include:

1. Littering less than or equal to 1 cubic foot, RCW 70.93.060(2)(a) (class 3)
2. Smoking in a public place, RCW 70.160.030
3. Urinating in public, SCC 10.04.120 (class 3)
4. Consuming liquor in public, RCW 66.44.100 (class 3)

Also, the transit authority may wish to issue an exclusion notice to the offender, which could be used as a basis for a Criminal Trespass charge, if the offender returns to the transit station or property. (See Section E, Criminal Trespass, below.)

B. Failure to Transfer Vehicle Title, RCW 46.12.650(7), and Cancelled License Plates / Unregistered Vehicle, RCW 46.12.160.

In general, we will no longer prosecute the crimes of Failure to Transfer Title, Driving with Cancelled License Plates or Driving an Unregistered Vehicle, when the offender committed no other crimes. We ask that law enforcement agencies refrain from sending us referrals on these, unless the offender committed other crimes. If no other crime was committed, there may be an applicable infraction to cite instead, such as:

1. Certificate of title required, RCW 46.12.520(1)
2. Registration and plates required, RCW 46.16A.030 ($529)
3. Registration certificate, RCW 46.16A.180.

C. Littering More Than 1 Cubic Foot and Littering More Than 1 Cubic Yard, RCW 70.93.060

In general, we will no longer prosecute Littering as a crime, unless there are egregious circumstances. Egregious circumstances may involve littering unusually large quantities, repetitive littering, or littering items or substances that endanger public safety. We ask that law enforcement agencies refrain from sending us referrals for the crime of Littering when there are no egregious circumstances. There are some littering infractions that could be cited instead, such as:

1. Littering in a County Park, SCC 22.16.180
2. Littering less than or equal to 1 cubic foot, RCW 70.93.060(2)(a) (class 3).

D. Third Degree Theft when loss is less than $25 and offender is an adult

In general, we will no longer prosecute adult offenders for Third Degree Theft when the pre-tax loss is less than $25, the offender committed no other crimes, and the offender has no theft history in the past two years. We do want law enforcement agencies to refer Third Degree Theft cases, regardless of the dollar amount of loss, so that we can consider all the circumstances of the incident to determine if we should make an exception to this general guideline.

E. Criminal Trespass in a place open to the general public

We will continue to charge Criminal Trespass when an offender is in a place open to the general public, if the referral includes a written notice of exclusion signed by the offender within the last 6 months or there is a witness who can testify to giving the offender notice of the exclusion within the last 6 months. In general, we will decline to prosecute an offender who received notice more than 6 months before the incident of the exclusion. The commission of additional criminal acts during the trespass incident, prior convictions for burglary or criminal trespass, or other pending burglary or criminal trespass charges may be grounds for an exception to this guideline, such that we may charge Criminal Trespass even if the exclusion notice was more than 6 months before the incident.

N.B. This memorandum supersedes the memorandum issued to Law Enforcement by Mark Roe on December 12, 2012 entitled “New Marijuana Laws”.